FILE COPY

No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1928

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLER FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 589

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, Doing Business Under the Firm Name of Millie Francis Oil Company, a Copartnership, petitioners

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE of the United States of America, in and for the Sixth Collection District, State of California

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition.

The question is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (quoted on pp. 4-5 of the petition for certiorari), deprived the petitioner of the defense of the statute of limitations and if so whether it offends against the due process clause

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of the Constitution. The pertinent dates are as follows (R. 8, 11–15):

March 22, 1918, return for 1917 was filed.

January, 1920, additional assessment made.

February 11, 1920, claim in abatement filed.

December 27, 1922, claim in abatement rejected.

March 22, 1923, expiration of five-year period for collection of tax.

November 19, 1924, notice and demand for payment of tax made.

November 29, 1924, and December 3, 1924, tax collected.

December 23, 1927, suit commenced.

The Circuit Court of Appeals, in an opinion (R. 31) reported in 35 F. (2d) 586, held that Section 611 of the Revenue Act of 1928 barred recovery in this case and accordingly reversed the judgment of the District Court, which was rendered without opinion (R. 15–18). This decision presents conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Burden, Smith & Co.*, 33 F. (2d) 229.

The question of the proper interpretation of Section 611 has been before several of the District Courts and there has been much diversity of opinion. To the cases listed in the petition (p. 6) should be added the following recent decisions of the Court of Claims supporting the position of the Government: *Oak Worsted Mills* v. *United States*, decided December 2, 1929, and *Gotham Can Co.* v. *United States* decided January

20, 1930. While we think it is immaterial, these two cases differ from the instant case in that the claims in abatement in those cases seem to have been rejected after the running of the statute of limitations.

Other cases involving the question are pending in the various District Courts, and it is of general importance. Although it is believed that the decision of the court below was right and that the interpretation which has been given the statute is in accord with the congressional purpose as disclosed by the legislative history, the question is one which should be determined by this Court.

Respectfully submitted.

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